122 FERC ¶ 61,126
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

SFPP, L.P. Docket No. OR92-8-025

ORDER ON INITIAL DECISION

(Issued February 12, 2008)

1. This order addresses exceptions to an Initial Decision in the captioned docket dated March 28, 2007.[1] The Initial Decision addressed two issues reserved by a settlement among the parties dated May 17, 2006, and accepted by the Commission on August 2, 2006.[2] The Commission generally affirms the Initial Decision with the clarifications discussed below.

Background

2. As explained in the Initial Decision, the settlement resolved by stipulation all of the factual issues involved in the instant docket, but reserved two legal issues for further hearing and decision. The first of these issues was whether SFPP's contracts with individual shippers establish a rate level that limits reparations for drain-dry services provided by SFPP prior to April 1, 1999. SFPP did not file the contracts with the Commission pursuant to section 6(1) of the Interstate Commerce Act.[3] Rather SFPP provided the drain-dry services at its Watson Station storage and pumping facilities pursuant to the contracts rather than a common carrier tariff. The Watson Station facilities are located where a number of local pipelines deliver various petroleum products to SFPP's truck line system in the greater Los Angeles area. SFPP established the charges to recover the costs incurred for improvements it made to the Watson Station facilities to more efficiently move different petroleum products through its breakout and storage tanks.

[1] *SFPP, L.P.*, 118 FERC ¶ 63,033 (2007) (Initial Decision).

[2] *SFPP, L.P.*, 116 FERC ¶ 61,116 at P 14, 16 (2006) (2006 Order).

[3] 49 U.S.C. app. § 6(1) (1988).

The second issue is whether the payment of any reparations may start on November 1, 1991, or are limited to the dates two years before the filing of each individual complaint.[4] The stipulated facts are summarized in detail in the Initial Decision and are not discussed here except as necessary to frame the Commission's conclusions.

3. The Initial Decision concluded that SFPP's contracts with individual shippers did not establish a rate level or preclude reparations during the period before April 1, 1999. This was the effective date for the common carrier tariffs SFPP filed in response to the 2006 Order holding that the Watson Station drain-dry charges were subject to the Commission's jurisdiction and directing SFPP to file a cost-based rate. The Initial Decision held that sections 6(1) and 6(7) of Interstate Commerce Act (ICA)[5] required SFPP to file all jurisdictional rates with the Commission and that it had failed to do so. The Initial Decision further held that there is no provision in the ICA allowing private contracts to supersede the Commission's authority to review the justness and reasonableness of oil pipeline rates or the related filing requirement under section 6(1).[6] Thus, the fact that SFPP entered into private contracts did not preclude reparations for the charges shipper paid prior to April 1, 1999. In support of its holding, the Initial Decision cited to the Commission's prior determination in *Texaco Refining and Marketing, Inc. v. SFPP, L.P* [7] and the Supreme Court's holding that oil pipelines must file all rates and charges with the appropriate regulatory agency to be valid even if the charges are included in a contract.[8]

4. The ALJ also rejected several of SFPP's arguments that it should not pay reparations should not be paid for equitable reasons. These included that: (1) the shippers were sophisticated and freely chose to be bound by the contracts; (2) SFPP had incurred costs in making the improvements; (3) it would be inequitable to deny SFPP the benefit of the bargain it struck; (4) the shipper Complainants had not established damages; and, (5) there can be no damages from a charge that the shipper Complainants agreed to pay. Finally, the Initial Decision concluded that no reparations would be available for more than two years prior to the filing of a complaint, citing section 16(3)(b)

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[4] Initial Decision at P 4.

[5] 49 U.S.C. app. §§ 6(1) and 6(7) (1988).

[6] *Id.* at P 55, citations omitted.

[7] *Texaco Refining and Marketing, Inc. v. SFPP, L.P.*, 117 FERC ¶ 61,285 (2006) (Sepulveda Initial Decision).

[8] Initial Decision at P 57, citing Sepulveda Initial Decision at P 19 and *Maislin Industries, U.S., Inc. et al., v. Primary Steel, Inc.*, 497 U.S. 116 (1990) (*Maislin*).

of the ICA,[9] which clearly establishes an absolute bar on claims that are more than two years old from the date of the complaint. The Initial Decision concluded that this bar extended to the period during which the Watson Station drain-dry charges were not on file with the Commission.

5. SFPP filed a brief on exceptions challenging the holdings on the first reserved issue. The Complainant shippers and the Commission staff filed reply briefs on exceptions supporting the Initial Decision. The arguments on exceptions are discussed below. No party filed exceptions to the holding regarding the two year statute of limitations.

Discussion

6. The Commission affirms the Initial Decision's conclusion that SFPP's contracts with individual shippers do not establish the rate level or limit reparations for drain-dry services provided prior to April 1, 1999, at its Watson Station storage and pumping facility. The Initial Decision is correct that the ICA imposes on the carrier the obligation to file all jurisdictional rates and charges with the Commission and explicitly provides that it may only recover those charges that are on file with the Commission. As the Initial Decision stated, section 6(1) of the ICA, provides that, "[e]very common carrier subject to the provisions of this chapter shall file with the Commission … schedules showing the rates, fares and charges for transportation.…[10] Moreover, section 6(7) of the ICA, provides in relevant part, that carriers may not:

> engage or participate in the transportation of … property … unless the rates, fares, and charges upon which the same [is] transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation ….[11]

This latter requirement assures that carriers with market power charge just and reasonable rates and avoid discrimination. The Initial Decision is correct that this is the fundamental concern addressed by *Maislin* and that SFPP's failure to file the contract charges at issue meant that they were not legal rates under the ICA. The Supreme Court stated this basic

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[9] 49 U.S.A. app. § 16(3)(b) (1988).

[10] 49 U.S.C. app. § 6(1) (1988).

[11] 49 U.S.C. app. § 6(7) (1988).

requirement at two places in *Maislin* in its review of an analogous situation involving negotiated truck rates that were on file with the Interstate Commerce Commission.

> The duty to file rates with the Commission, *see* §10762, and the obligation to charge only those rates, *see* §10761, have always been considered essential to preventing discrimination and stabilizing rates. "In order to render rates definite and certain, and to prevent discrimination and other abuses, the statute require[s] the filing and publishing of tariffs specifying the rates adopted by the carrier, and makes these *legal* rates, that is, those which must be charged to all shippers alike." *Arizona Grocery Co. v. Atchison, T. & S. F. R. R. Co.*, 284 U.S. 370, 384 (1932).[12] (Emphasis added).

Later in its opinion the Court continued:

> Compliance with §§ 10761 and 10762 is "utterly central" to the administration of the Act. *Regular Common Carrier Conference v. United States*, 253 U.S.App.D.C. 305, 308, 793 F.2d 376, 379 (1986). "Without [these provisions] … it would be monumentally difficult to enforce the requirements that rates be reasonable and non-discriminatory, … and virtually impossible for the public to assert its right to challenge the lawfulness of the existing rates." *Ibid.* (Citations omitted).[13] (Emphasis added).

It is clear from this language that the filing requirements of the ICA are addressed both to reasonableness and discrimination. However, SFPP argues that *Maislin* focuses only on the issue of the failure to charge the filed rate and the related risk of discrimination. It further asserts that in the instant case all the relevant shippers executed contracts for service and therefore the issue of discrimination on behalf of unknown shippers is remote. While the narrow holding of *Maislin* is as SFPP asserts, the subsequent conclusion goes too far. In fact, the Supreme Court previously held that private contracts are enforceable precisely because they must be filed with the appropriate regulatory agency. On this point, in addressing the filed rate doctrine

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[12] *Maislin* at 126. Sections 10762 and 10761 of the ICA, as codified in 1978, parallel sections 6(1) and 6(7) of the 1977 version of the ICA that governs oil pipeline transportation.

[13] *Id.* at 132.

embedded in *Maislin*, the D.C. Circuit in reviewing certain private contracts executed under the Natural Gas Act, stated in *City of Piqua v. FERC*[14] that:

> The Supreme Court, discussing this issue, declared, "[W]e should bear in mind that [the Act] evinces no purpose to abrogate private contracts as such. To the contrary, by requiring contract to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts." … Deference to the parties' contractual arrangements, according to the Court, does not impair the regulatory powers of the Commission. The Commission can at any time conduct hearings on a contract rate and modify it if unreasonable.[15] (Citations omitted and emphasis added).

The court also previously stated that:

> The primary purpose of section 205(d) is to notify the Commission of changes to rates and schedule between the parties to a utilities contract. *United Gas Pipe Line Co. v. Mobile Gas Service Company*, 350 U.S. 332, 339-40, 76 S. Ct 373, 100 L. Ed. 373 (1956). A change in rates cannot take place without first filing notice with the Commission. Once the notice is filed, the Commission can investigate and review the rate change to ensure that it serves the public interest …. As this court has stated, "[s]ection 205 purports to dictate not *when* contractually-authorized rate increases *can* be made operative but only that they *cannot* become operative at any time without compliance with the statutory procedure."[16] (Certain citations omitted and emphasis added).

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[14] *City of Piqua, Ohio v. FERC*, 610 F.2d 950 (1979) (*City of Piqua*). Section 205 of the Natural Gas Act provides the filing requirement that parallels sections 6(1) and 6(7) of the ICA.

[15] *Id.* at 954.

[16] *Id.* at 953.

7. Both *Maislin* and *City of Piqua*[17] make clear that the filing requirement of the ICA and the related provision of the NGA are mandatory requirements that attach to jurisdictional contracts and that the charges contained therein will not be legal rates unless filed with the appropriate regulatory body. Even if the charges are filed, the carrier takes "its chances that in an action by the shipper these might be adjudged unreasonable and reparations awarded."[18] The risk is equal, or even greater, if the charges are jurisdictional and not on file with the Commission, because this omission would defeat the fundamental purposes of the Act.[19]

8. For this reason, SFPP's continued reliance on statements in Opinion No. 435 that the contract rates could be binding on the parties even if not filed with the Commission is misplaced.[20] The Commission's analysis was grounded in the filed rate doctrine and relied in essence on the seminal case of *City of Piqua*.[21] Thus the Commission based its conclusion on the holding in that case on its finding that the filed rate doctrine was satisfied through the contractual undertakings of the parties. However, *City of Piqua* is quite clear that the mutual agreement of the parties does not relieve the pipeline involved of the fundamental obligation to file the contract with the Commission. Opinion No. 435 failed to address this point and the order was inconsistent with the filing requirement

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[17] *Id.* at 955.

[18] *Arizona Grocery Co. v. Atchison, T. & S. F. R. R. Co.*, 284 U.S. 370, 382 (1932). The Supreme Court has also stated that: "[a utility] can claim no rate as a legal right that is other than the filed rate…." *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951), cited in *City of Piqua* at 955.

[19] *Accord Xcel Energy Services Inc. v. FERC*, No. 06-1174, D.C. Cir., slip op. dated December 14, 2007 at 8, noting the Commission's policy under the Federal Power Act that if a "rate goes into effect after the service has commence, we will require the utility to refund to its customers the time value of the revenues collected … for the entire period that the rate was collected without authorization." (Citation omitted). It is relevant here that the utility had executed sales contracts for the entire period at issue, but those contracts had not been filed with the Commission for some four years after the utility began collection of revenues under those contracts.

[20] *See SFPP, L.P.*, Opinion No. 435, 86 FERC ¶ 61,022 (1999), *order on reh'g*, Opinion No. 435-A, 91 FERC ¶ 61,135 (2000), *order on reh'g*, Opinion 435-B, 96 FERC ¶ 61,281 (2001), *reversed in part on appeal sub nom., BP West Coast Products, L.L.C. v. FERC*, 374 F.3d 1263 (D.C. Cir. 2004).

[21] *Id.* at 61,075-76.

discussed in *Maislin*. Accordingly, any contrary statements in Opinion No. 435 and the related Commission appellate briefs are of no help to SFPP.

9. Notwithstanding the above analysis, SFPP advances two arguments asserting that contract rates are valid even if not filed as required by the statute. It first asserts that both the shipper and the pipeline believed in good faith that the instant charges were not jurisdictional and therefore there was no need to file them. The short answer to this is that nothing in the stipulation in the instant case supports this conclusion, and in any event, the statutory obligation is absolute and is one that is imposed on the carrier. The effectiveness of the statutory structure should not have to turn on the Commission's interpretation of the carrier's state of mind. Thus, if the carrier wishes to protect itself, the traditional practice is to file the charges with a motion to dismiss. If the shipper has agreed that the rates and charges are not jurisdictional, it can join or support the motion. This protects all parties' interests, including the regulatory obligations imposed by the statute on the Commission.

10. Second, as noted, SFPP asserts that *Maislin* only addresses the situation of the carrier's failure to adhere to the filed rate, and as such, that the decision addresses the risk of discrimination only in that context. This argument is specious. As staff and the other parties correctly assert, *Maislin* is grounded in the statutory obligation to have the rate charged actually on file with the regulatory body. In fact, *Maislin* specifically rejected the agency's efforts to use the maximum rate on file as a rate ceiling with the discounts below that rate being just and reasonable because they were established by competition. Even though the trucking market involved was competitive, this did not absolve the carrier of its obligation to file a tariff setting forth the discounted rates unless relieved of that obligation by the statute.

11. For these reasons, the Initial Decision correctly held that SFPP was required to file the contract charges at issue with the Commission, that its failure to do so was grounds for the Complainants to file a complaint with the Commission, that SFPP bore the risk that they might do so, and that SFPP thereby exposed itself to liability that the Commission might find the charges to be unjust and unreasonable. Therefore the remaining issue is whether that liability should attach in instant case, and if so, whether reparations should be awarded. As noted, the Initial Decision held that the Commission should award reparations under the circumstances here.

12. On exceptions, SFPP advances several arguments why the Commission should not award reparations. First, it argues that the Complainant shippers are required to establish damages. This argument is wholly without merit. The amount of any reparations is established by the settlement previously approved by the Commission. This establishes what the "damages" should be if SFPP is not shielded from liability as a matter of law by its negotiated contracts with the Complainant shippers. As has been explained, it is not so shielded and complaints are properly laid against the contract charges. The complainants' central point is that the Watson Station drain-dry charges are unjust and

unreasonable. The settlement agreement stipulates how the just and reasonable rate would be defined (retrospectively) if liability attaches. The only issue here is whether liability in fact attaches. Given this, the Commission does not see how SFPP could have advanced a good faith argument here that the Complainant shippers are required to prove damages if they prevail on the legal issue of liability presented by the stipulation.

13. SFPP also asserts that reparations, like refunds, are an equitable remedy and that the Commission is not compelled to award reparations. This is true, but the Commission concludes that the there is no equitable reason to deny shippers reparations under the circumstances here. SFPP argues that the contracts at issue were voluntary arms length transactions and therefore there reparations are not warranted based on its failure to file the contracts at issue with the Commission. For the reasons previously discussed, this point is irrelevant because the obligation to file the charges is absolute. Failure to hold that shippers are at least eligible for reparations would undercut the carrier's incentives to do so and increase its incentives to require the shipper to waive its right of review as a condition of obtaining service or to offer the shipper a preferential rate.

14. SFPP also argues that the Complainant shippers approached SFPP and requested a rate to lower their cost of complying with certain operational and minimum pumping volume requirements SFPP intended to impose to assure efficient operation of its breakout and storage tanks. Given this request, SFPP states that it quoted a rate of approximately 4 cents per barrel to all the interested shippers and negotiated contracts of different lengths and termination provisions. SFPP asserts that the shippers were satisfied with the contract terms and that this should end of the matter. However, the stipulated facts contain nothing indicating that the shippers were satisfied in the sense that SFPP implies, i.e., that the resulting charge was just and reasonable because SFPP was unable to exercise market power that would lead to the opposite result.

15. SFPP's argument might have merit if the record established that the rate involved unequivocally reflected effective competition at the time the contractual charge became effective and was sufficiently clear to warrant a conclusion that the prophylactic purposes of the statute would not be compromised by denying reparations. However no such record exists here and in fact, that record appears to the contrary. The correspondence suggests that SFPP stated that the rate would be some 4 to 5 cents per barrel and the shippers were left with the option of accepting or rejecting the offer.[22] That they accepted the offer at best suggests that SFPP's offer was less costly (or severe) than the cost the shippers would incur if they elected to meet SFPP's operational requirements at their own expense. Thus, on this record there are no compelling assurances that SFPP did not simply extract an economic rent based on the difference between its own costs for

[22] *See* Filing dated October 6, 2006 transmitting a Joint Stipulation of Facts, Attachment 4, Tab A,

resolving the operating issues at Watson Station and the costs each of the shippers would have incurred on its own hook. As the earlier discussion concludes, the filing requirements of the ICA are designed precisely to afford shippers an opportunity to challenge this type of economic leverage.[23] In fact, the filing requirement places pressure on the carrier to act reasonably. If the agreements are in fact "voluntary" based on the mitigating presence of effective alternatives for the shipper, the charges may be filed without protest as a consensual common carrier rate, as has often been the case in the oil pipeline industry.[24] The Commission's oil pipeline rate filing procedures now recognize this and provide a method for filing this type of quasi-contract rate.[25] In contrast, given the incentives a carrier has to extract an unjust and unreasonable rate if a tariff is not filed, the Commission must presume absent compelling evidence to the contrary that there was insufficient competition to assure that an unfiled rate was just and reasonable and therefore the Commission should not deny reparations here on equitable grounds.[26]

16. SFPP also argues that awarding reparations deprives it of the benefit of its bargain and provides the Complainant shippers an opportunity to obtain their side of the bargain without providing the consideration they agreed to. To the extent SFPP argues that the Complainant shippers seek to avoid all of their obligations, or would have incentives to do so, this is belied by the Complainant shippers' explicit recognition that SFPP is entitled to recover the reasonable value of its services even if its rate was unfiled. Thus,

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[23] In fact, the parties appear to have resolved any premium above a competition based rate through the stipulation of the amount to be refunded if liability can attach for the charges collected under the contracts. *Cf. ExxonMobil Oil Corporation v. FERC*, 487 F.3d 945 at 961 (2007) (*ExxonMobil*), noting that the purpose of a cost-of-service rates is to simulate what a pipeline's economic behavior would be in a competitive market.

[24] *ExxonMobil* at 961, noting SFPP's and the Association of Oil Pipe Lines' argument to this effect.

[25] *See* 18 C.F.R. § 342.2(b) (2007), which provides:

> A carrier must justify an initial rate for new service by:
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> (b) Filing a sworn affidavit that the rate is agreed to by at least one non-affiliated person who intends to use the service in question, *provided* that if a protest to the initial rate is filed, the carrier must comply with paragraph (a) of this section.

[26] *E.g.* 18 C.F.R. § 342.4(b) (2007), which provides that a carrier may attempt to show that it lacks significant market power in the market in which it proposes to charge market based rates.

there seems to be agreement among the parties that a quasi-contract, or *quantum meruit* type compensation, is appropriate even in the context of economic regulation. The Commission certainly agrees that some compensation is warranted given that SFPP undoubtedly performed. However, the reasonable value of that performance has been established by the settlement terms and there is no reason to pursue it further here.

17. SFPP also argues that awarding reparations will discourage settlements or contract type negotiations. Both arguments are without merit. Settlement did occur here and the Commission adopted rate filing provisions that explicitly encourage common carrier filings that are in the nature of contract rates. Moreover, the requirement to file all rates and charges has not discouraged contract-type common carrier rates in the past, and as the industry has noted, many rates filed with the Commission have been established in this manner. For the reasons stated, the Initial Decision is affirmed and SFPP shall make reparations according to the terms of the settlement previously approved by the Commission.

The Commission orders:

The Initial Decision is affirmed for the reasons stated in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.